RENDERED: SEPTEMBER 15, 2000; 10:00 a.m.
TO BE PUBLISHED
MODIFIED: September 29, 2000; 10:00 a.m.

Commonwealth Of Kentucky

Court Of Appeals

NOS. 1999-CA-000363-MR and 1999-CA-000688-MR

RICHARD ASENTE and CHERYL ASENTE — APPELLANTS

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 98-CI-01610

REGINA MOORE, JERRY DORNING,
and JUSTIN LEE MOORE — APPELLEES

OPINION
AFFIRMING IN PART;
REVERSING IN PART AND REMANDING
* * * * * * * * * * *

BEFORE: BUCKINGHAM, KNOPF, AND SCHRODER, Judges.

BUCKINGHAM, JUDGE. Richard and Cheryl Asente, Ohio residents who are prospective adoptive parents of a child born to Regina Moore and Jerry Dorning, appeal from judgments and orders of the Kenton Circuit Court directing that the child be returned to Moore and Dorning, the biological parents who reside in Kentucky. The decision which must be made by this court involves the future of the child, Justin, who is now approximately three and one-half years old and who has resided with the Asentes for the last two and one-half years of his life. Having reviewed the facts and the record, the relevant statutes and case law, and the oral and

written arguments of counsel, we conclude the trial court correctly determined that Kentucky has jurisdiction to resolve this controversy. However, for the reasons set forth hereinafter, we believe the Asentes are entitled to keep the child. Thus, we affirm in part, reverse in part, and remand.

The child, Justin Lee Moore, was born on February 28, 1997, to Regina Moore. Jerry Dorning is the biological father. Moore and Dorning had another child, Joey, who was previously adopted by the Asentes. When Moore discovered she was pregnant with Justin, she contacted the Asentes to see if they would be interested in adopting Justin as well. An agreement was reached whereby the Asentes would adopt the child, but Moore and Dorning changed their minds following Justin's birth and decided they wanted to raise him. However, in November 1997, Moore and Dorning again changed their minds and contacted the Asentes to determine whether they would still consider adopting the child. The Asentes agreed, and the legal process began.

Thomas C. Donnelly, the attorney who represented Moore and Dorning in the placement of Joey, agreed to represent their interests in the proposed adoption. His fee for representing them was paid by the Asentes. On December 16, 1997, Moore and Dorning signed an Application for Permission to Receive or Place a Child on a form provided by the Kentucky Cabinet for Families and Children. On January 12, 1998, Moore and Dorning signed an Interstate Compact Placement Request. On January 27, 1998, Moore and Dorning each executed a Voluntary and Informed Consent to Adoption. These consents were executed in the presence of

Donnelly, who prepared the consent documents, and a notary public. The consent documents provide as follows:

VOLUNTARY AND INFORMED CONSENT TO ADOPTION

1. Comes [Regina Carol Moore/Jerry Lee Dorning], the birth [mother/father] of Baby Justin Lee Moore and the consenting person, and having been duly sworn does state under oath that [she/he] has been fully informed of the legal effects of this Consent. [She/he] understands that twenty (20) days after signing this Consent, that it shall become final and irrevocable.

2. [Regina Carol Moore/Jerry Lee Dorning] affirms that [she/he] has not been given or promised anything of value, except statutorily allowed expenses.

3. [Regina Carol Moore/Jerry Lee Dorning] affirms that [she/he] has not been coerced in any way to execute this Consent, and that the Consent is voluntarily and knowingly given.

4. [Regina Carol Moore/Jerry Lee Dorning] affirms that [she/he] is not under the influence of drugs, alcohol or any other medication which might influence [her/his] ability to make a decision.

5. [Regina Carol Moore/Jerry Lee Dorning] has chosen to be represented by independent legal counsel, Thomas C. Donnelly, Esq., 77 W. Villa Place, 1000 St. Jude Center, Ft. Thomas, KY 41075. (513) 221-7722.

6. Justin Lee Moore, the child to be adopted, was born on February 28, 1997 at St. Luke West Hospital in Florence, Kentucky and currently resides with his birth parents at 7 Indiana Drive, Covington, Kentucky 41015.

7. The identity of the prospective adoptive parents are Rich and Cheryl Asente, residing in the state of Ohio.

8. It has been explained to me by Thomas C. Donnelly, Esq. that this Consent to Adoption will be final and irrevocable twenty (20) days after the execution of the placement which was previously approved, if approval of a placement was required, and that this

Consent will be final and irrevocable twenty (20) days after approval of the placement, if not already approved.

9. If the child is not adopted, it is my wish that I be contacted regarding any future plans for the child.

10. [Regina Carol Moore/Jerry Lee Dorning] affirms that [she/he] has or will receive a completed and signed copy of this Consent.

11. [Regina Carol Moore/Jerry Lee Dorning], the consenting person understands that this Consent may only be withdrawn by written notification sent by certified or registered mail, addressed to either the attorney for the consenting person or the attorney for the adoptive parents within twenty (20) days following the execution of the Consent. The attorney for the consenting person is: Thomas C. Donnelly, Esq. 77 W. Villa Place, 1000 St. Jude Center, Ft. Thomas, KY 41075. The attorney for the prospective adoptive parents is: John R. Gargano, Esq., 294 Harmon, NW, P.O. Box 1859, Warren, Ohio 44482-1859.

12. This document was prepared by Thomas C. Donnelly, Esq., 77 W. Villa Place, 1000 St. Jude Center, Ft. Thomas, KY 41075.

13. This document was explained to the consenting person by [her/his] attorney, Thomas C. Donnelly, Esq.

14. This Consent was executed at 3:00 pm on the 27 day of Jan , 1998 at Star Bank Latonia .

[Regina Carol Moore/Jerry Lee Dorning], the consenting person, hereby verifies that this Consent has been reviewed with and fully explained to [her/him].

/s/ [Regina C. Moore/Jerry Lee Dorning]
[Regina Carol Moore/Jerry Lee Dorning],
Birth [Mother/Father] and Consenting Person

Subscribed, sworn to and verified and acknowledged to me by [Regina Carol

Moore/Jerry Lee Dorning], this 27 day of Jan , 1998.

My Commission expires 2-13-01

/s/ Melissa Coleman
Notary Public

/s/ Thomas C. Donnelly
Thomas C. Donnelly, Esq.
Attorney for Birth Parents

Subscribed, sworn to and verified and acknowledged to me by Thomas C. Donnelly, Esq., this 27 day of Jan, 1998.

My Commission expires 2-13-01

/s/ Melissa Coleman
Notary Public

During a meeting between Moore, Dorning, and Donnelly to execute the consents on that day, Donna Womack, a family services clinician for the Cabinet for Families and Children, interviewed Moore and Dorning as a part of the independent adoption process and later completed the Independent Adoption Placement Investigation Report.

On February 17, 1998, the placement of Justin with the Asentes was approved by both the Kentucky and Ohio Interstate Compact on the Placement of Children (ICPC) offices. On that same day, Moore and Dorning physically handed Justin over to the Asentes, who then took him to his new home in Ohio where he has lived with the Asentes and his biological brother until the present.[1] Also on the same day, prior to Justin's placement with the Asentes, the Asentes signed a Legal Risk Statement which had been prepared by Donnelly. The document provided that the Asentes understood that until the parental rights of Moore and Dorning were terminated, their adoption plan was at risk because

[1] Pursuant to the terms of the consents signed by Moore and Dorning, the twenty-day period for revocation of the consents began to run on this day.

"the birth parents can revoke their consents." On the following day, the Asentes' attorney, John Gargano, acknowledged in a letter to Donnelly that he would proceed with the adoption process in Ohio once he was provided with certified copies of the court records terminating the parental rights of Moore and Dorning in Kentucky.

On March 9, 1998, Moore and Dorning signed a Verified Petition for Voluntary Termination of Parental Rights. The petition was filed in the Kenton Circuit Court on March 16, 1998, and a hearing was scheduled for March 26, 1998. On the hearing date, Moore and Dorning orally informed Donnelly that they had again changed their minds and wanted Justin returned to them. On the same day, Moore called the Asentes and informed them that she and Dorning did not want to proceed with the termination of their parental rights but wanted Justin returned to them. Cheryl Asente responded to Moore by letter on the same day, pleading with Moore to allow the adoption but also stating that "we understand that he is not ours until you take that final step . . . ." On April 1, 1998, Moore called Virginia Smith, the Kentucky administrator of the ICPC, and told her that she wanted Justin returned. Smith informed Moore that the consents had already become final and irrevocable pursuant to their terms.

On May 14, 1998, when it became apparent that the Asentes would not return Justin, Moore and Dorning filed a motion in the termination of parental rights action requesting that Justin be returned to them. On June 5, 1998, the Asentes filed a Petition for Adoption of a Minor in an Ohio probate court. In

early July 1998, the Kenton Circuit Court judge met with the Ohio probate court judge, and it was agreed that Kentucky would assume jurisdiction over the matter. Consequently, on July 6, 1998, the trial court entered an order in the Kentucky termination action holding that it had jurisdiction over Justin. Two days later, the Ohio probate court dismissed the Asentes' petition to adopt Justin, finding that the Kenton Circuit Court had jurisdiction over the child.

On August 6, 1998, the day of the status conference in the termination of rights proceeding, the trial court held that the Asentes were not proper parties to the termination action and excluded them from further participation in the case. On the same day, the Asentes filed a Notice of Appeal in the Ohio Court of Appeals seeking reversal of the Ohio probate court's dismissal of their petition to adopt Justin. On August 17, 1998, a final hearing was held in the termination action. On the same day, in a separate and independent action, Moore and Dorning filed a Petition for Immediate Entitlement/Petition for Custody with the Kenton Circuit Court. Summonses on the Asentes were issued the following day.

On September 4, 1998, the Asentes moved to dismiss the custody action filed by Moore and Dorning. On September 24, 1998, the court entered an order in the termination action which held that the adoption consents by Moore and Dorning had been revoked. Further, the court dismissed the termination action. On October 22, 1998, relying on the September 24, 1998, order in the termination case, the trial court entered an order in the

custody action determining that the consents previously executed by Moore and Dorning had been revoked and that they had standing to pursue the custody action.[2] Holding that it had jurisdiction, the court also denied the Asentes' motion to dismiss. The Asentes have appealed from this order. On December 14, 1998, the Ohio probate court reinstated the Asentes' petition to adopt.

[2] The trial court's order of October 22, 1998, was entered by Judge Steven R. Jaeger. This was apparently Judge Jaeger's only contact with the case, and he conducted the hearing on the Asentes' motion to dismiss and entered the order due to a scheduling conflict with Judge Patricia M. Summe, the judge who handled all other aspects in the case.

On February 4, 1999, the trial of the custody action came before the Kenton Circuit Court. The trial judge announced that the court would hear only testimony concerning whether the consents to adopt Justin were knowingly and voluntarily executed by Moore and Dorning. The court first held, however, that the issue of the validity of the consents was not properly before the court because that issue had been determined in the termination action (in which the Asentes were not parties). It then held that the consents were invalid for purposes of the custody action as well.

In its order granting the Petition for Immediate Entitlement/Petition for Custody, the trial court accepted the testimony of Moore and Dorning and of their attorney, Donnelly, that Donnelly had informed them they would have until the final hearing in the termination of parental rights action to change their minds concerning giving up Justin. Although the termination of parental rights action in Kentucky was unnecessary to accomplish the adoption,[3] Donnelly testified that the termination action in Kentucky was initiated as a quicker way to assure the parental rights of Moore and Dorning would be terminated. The trial court also stated in its findings of fact that the Asentes had hired Donnelly to represent Moore and Dorning with respect to the termination of their parental rights. Furthermore, the court found that Donna Womack, the family

[3] See Wright v. Howard, Ky. App., 711 S.W.2d 492 (1986), wherein this court held that "a judgment of adoption in and of itself terminates any meaningful legal relationship between the adopted child and its non-consenting party defendant natural parent . . . ." Id. at 494.

services clinician who had interviewed Moore and Dorning on the day they signed the adoption consents, had told them they would have either twenty days after they signed the consents or until their parental rights were terminated by the court, "whichever their attorney and they chose to pursue," to change their minds.

In holding that the consents given by Moore and Dorning were not knowingly and voluntarily given, the trial court held as follows:

> Because Petitioners were made to believe that their consent to the placement and adoption would not be final until their parental rights were terminated in a court proceeding, they never understood the consequences of executing the consent. Therefore, Petitioners never gave a knowing and voluntary consent to the termination or adoption. Thus, the consents executed on January 27, 1998, relying on this misinformation, were void as a matter of law. As the consents are void, any acts taken on authority of those consents is likewise void, including the approval of the placement of the child with Respondents.

The trial court reasoned that "[t]he Petitioners were never informed that they were signing a KRS 199 consent because they were not, and even if they were signing a KRS 199 consent, they were not informed of the effect their signatures would have."

Citing Boatwright v. Walker, Ky. App., 715 S.W.2d 237 (1986), the trial court held that the rights of Moore and Dorning to the custody of Justin could only be abrogated by the Asentes by a showing of unfitness sufficient to support an involuntary termination of parental rights. A hearing was then set by the court to allow evidence on the issue of fitness. This order,

from which the Asentes have appealed, was entered on February 11, 1999.

On March 16, 1999, the day of the hearing to determine the fitness of Moore and Dorning, the court heard limited testimony before determining that Moore and Dorning were presumed to be fit, that they were entitled to custody of Justin, and that "[a]ny such evidence concerning unfitness must be presented by one with legal authority to remove a child from one with legal custody, such as the Cabinet for Families and Children." The Asentes have also appealed from this order.

On March 3, 1999, the Ohio probate judge[4] and the Kenton Circuit Court judge again met to attempt to resolve the issue of jurisdiction between the states.[5] However, they were unable to reach an agreement. On April 2, 1999, a hearing was held in the adoption action in the Ohio probate court which resulted in an order by that court on April 8, 1999, holding that Kentucky did not have jurisdiction over this matter pursuant to the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA). The order also held that Ohio was the home state of Justin and that full faith and credit would not be afforded to the orders of the Kenton Circuit Court in Kentucky. Moore and Dorning appealed the Ohio probate court's order, and, on November 1, 1999, the Ohio Court of Appeals entered an order reversing the Ohio probate court and

---

[4] The Ohio probate judge who met with Judge Summe on that day was not the same Ohio probate judge who met with Judge Summe in July 1998.

[5] See Kentucky Revised Statute (KRS) 403.450(3).

holding that Ohio did not have jurisdiction over the case. The Asentes appealed this order to the Ohio Supreme Court, and that court affirmed the Ohio Court of Appeals on August 23, 2000.

The first issue this court must confront is whether the Kenton Circuit Court had jurisdiction to enter its judgments and orders. The Asentes maintain that it did not. The relevant statutes for our consideration are the Interstate Compact on Placement of Children (ICPC) (KRS 615.030-.990) and the Uniform Child Custody Jurisdiction Act (UCCJA) (KRS 403.400-.630). The relevant portion of Article V of the ICPC states as follows:

RETENTION OF JURISDICTION

> (a) The sending agency shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment and disposition of the child which it would have had if the child had remained in the sending agency's state, until the child is adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state. Such jurisdiction shall also include the power to effect or cause the return of the child or its transfer to another location and custody pursuant to law. The sending agency shall continue to have financial responsibility for support and maintenance of the child during the period of the placement. Nothing contained herein shall defeat a claim of jurisdiction by a receiving state sufficient to deal with an act of delinquency or crime committed therein.

KRS 615.030, Article V(a). The relevant portion of the UCCJA adopted by Kentucky provides as follows:

> (1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody

determination by initial or modification decree if:

(a) This state is the home state of the child at the time of commencement of the proceeding, or had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state; or

(b) It is in the best interest of the child that a court of this state assume jurisdiction because the child and his parents, or the child and at least one (1) contestant, have a significant connection with this state, and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(c) The child is physically present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(d) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (a), (b), or (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and it is in the best interest of the child that this court assume jurisdiction.

KRS 403.420(1). In its October 22, 1998, order, the trial court determined Kentucky should retain jurisdiction of the case, and

it obviously made that determination pursuant to the UCCJA. The court held as follows:

> The instant action was filed within 6 months of the placement of the child in Ohio. Kentucky remains the home state of the child. It is in the best interest of the child that Kentucky retain jurisdiction because of the significant connections to Kentucky and the existence of substantial evidence within this state. The Respondents have no judicial decree or order placing the child within their custody or control

It is not entirely clear whether either the ICPC or the UCCJA apply to jurisdictional conflicts in adoption proceedings. Kentucky courts have yet to provide guidance on this issue. It may be argued that Article V of the ICPC uses the term "jurisdiction" merely to refer to which party in an adoption proceeding has the responsibility for a child's well-being and not to refer to the jurisdiction of a court.[6] It may also be argued that the UCCJA likewise has no applicability to jurisdictional conflicts in adoption proceedings but only relates to normal custody proceedings since the term "adoption" is not included within the definition of "custody proceeding" as that term is defined in KRS 403.410(3).[7]

We conclude that the Petition for Immediate Entitlement/Petition for Custody was a "custody proceeding" under the UCCJA, thereby making those statutes applicable. We further

---

[6] The term "sending agency" in Article V of the ICPC includes "a person" within its definition. KRS 615.030, Article II(b).

[7] KRS 403.410(3) states "'Custody proceeding' includes proceedings in which a custody determination is one (1) of several issues, such as an action for divorce or separation, and includes child neglect and dependency proceedings[.]"

conclude that the record indicates all orders entered by the Kenton Circuit Court from which the Asentes have appealed were entered at times when Ohio had yielded to Kentucky and declined jurisdiction. See KRS 403.420(1)(d). The July 1998 meeting between the Ohio judge and the Kentucky judge resulted in an agreement and orders by the respective courts that Kentucky would assume jurisdiction of the case. The Ohio court never challenged Kentucky's jurisdiction over the case again until it entered an order on April 8, 1999, holding that Kentucky did not have jurisdiction and that it would not grant full faith and credit to the Kentucky court orders. This Ohio court order, however, was entered after all orders which are the subject of this appeal were entered. Furthermore, the Ohio court order has since been reversed, and the Ohio appellate courts have concluded that Kentucky has jurisdiction over the present controversy. We therefore hold that the Kenton Circuit Court had jurisdiction pursuant to KRS 403.420(1)(d) to enter its judgments and orders.[8]

The next issue is whether the trial court erred in

[8] We are unpersuaded by the Asentes' argument that we should follow the reasoning of the court in Matter of Jarrett, 230 A.D.2d 513, 660 N.Y.S. 2d 916 (1997). In that case, the court held that the execution of the valid consent document by the biological mother in Pennsylvania transferred both the child and the jurisdiction to New York pursuant to Article V of the ICPC. The UCCJA was not applicable because New York's adoption of it, unlike Pennsylvania's (and Kentucky's), "specifically excludes 'proceedings for adoption.'" Id. 660 N.Y.S. at 922. Further, the Ohio Court of Appeals, in its decision that Ohio does not have jurisdiction in this case, noted that a majority of jurisdictions have applied the UCCJA to adoption cases. We agree with this view that the UCCJA applies to such jurisdictional conflicts because an adoption proceeding is a form of a custody proceeding in that it results in the termination of all parental rights of the biological parents, including their custody rights.

granting custody of Justin to Moore and Dorning. Obviously, the question will be answered by determining the validity of the consents to adoption signed by Moore and Dorning prior to their turning Justin over to the Asentes. Included in the first paragraph of the consent is the statement that the parties understand that "twenty (20) days after signing this Consent it shall become final and irrevocable." Paragraph 8 of the consent states as follows:

> It has been explained to me by Thomas C. Donnelly, Esq. that this Consent to Adoption will be final and irrevocable twenty (20) days after the execution of the placement which was previously approved, if approval of a placement was required, and that this Consent will be final and irrevocable twenty (20) days after approval of the placement, if not already approved.

Further, KRS 199.500(5) provides in relevant part that

> A voluntary and informed consent . . . shall become final and irrevocable twenty (20) days after either the interstate or intrastate placement approval by the Secretary of the Cabinet for Families and Services, or twenty (20) days after the execution of the consent if placement approval was given prior to the signing of the consent, if approval is required.

Despite the language in the consents signed by Moore and Dorning and in the statute, they maintain their consents were void because they were uninformed of the legal consequences since they had been advised by their attorney that they had until the termination hearing was held to change their minds. The trial court agreed and concluded that Moore and Dorning never gave consent to the adoption because they were made to believe that their consent would not be final until their parental rights were

terminated. The court further held that since Moore and Dorning changed their minds and withdrew their consent prior to the final termination hearing, then the child should have been returned to them at that time.

KRS 199.500(1) sets forth the circumstances under which an adoption may be granted in Kentucky. That statute provides:

> (1) An adoption shall not be granted without the voluntary and informed consent of the living parent or parents of a child born in lawful wedlock or the mother of the child born out of wedlock, or the father of the child born out of wedlock if paternity is established in a legal action or if an affidavit is filed stating that the affiant is the father of the child, except that the consent of the living parent or parents shall not be required if:
>
> (a) The parent or parents have been adjudged mentally disabled and the judgment shall have been in effect for not less than one (1) year prior to the filing of the petition for adoption;
>
> (b) The parental rights of the parents have been terminated under KRS Chapter 625;
>
> (c) The living parents are divorced and the parental rights of one (1) parent have been terminated under KRS Chapter 625 and consent has been given by the parent having custody and control of the child; or
>
> (d) The biological parent has not established parental rights as required by KRS 625.065.

KRS 199.500(1). The term "voluntary and informed consent" is statutorily defined as follows:

> "Voluntary and informed consent" means that at the time of the execution of the consent

the consenting person was fully informed of the legal effect of the consent, that the consenting person was not given or promised anything of value except those expenses allowable under KRS 199.590(6), that the consenting person was not coerced in any way to execute the consent, and that the consent was voluntarily and knowingly given. If at the time of the execution of the consent the consenting person was represented by independent legal counsel, there shall be a presumption that the consent was voluntary and informed. In the event the person was not represented by independent legal counsel, the consent shall be in writing, signed and sworn to by the consenting person and include the following:

(a) Date, time, and place of the execution of the consent;

(b) Name of the child, if any, to be adopted and the date and place of the child's birth;

(c) Consenting person's relationship to the child;

(d) Identity of the proposed adoptive parents or a statement that the consenting person does not desire to know the identification of the proposed adoptive parents;

(e) A statement that the consenting person understands that the consent will be final and irrevocable twenty (20) days after the execution of the consent if the placement was previously approved, if approval of the placement is required;

(f) Disposition of the child if the adoption is not adjudged;

(g) A statement that the consenting person has received a completed and signed copy of the consent at the time of the execution of the consent;

(h) A statement that the consenting person understands that the consent may only be withdrawn by written notification sent by certified or registered mail

addressed to either the attorney for the consenting person or to the attorney for the adoptive parents, within thirty (30) days following the execution of the consent;

(i) Name and address of the person who prepared the consent, name and address of the person who reviewed and explained the consent to the consenting person, and a verified statement from the consenting person that the consent has been reviewed with and fully explained to the consenting person; and

(j) Total amount of the consenting person's legal fees, if any, for any purpose related to the execution of the consent and the source of payment of the legal fees.

KRS 199.011(14).

The underlying basis of the trial court's decision is its belief that the consent related only to the termination of parental rights proceeding. As the court stated in its February 11, 1999, order, "both the Respondent Asentes and the Petitioners knew the proceeding in Kentucky was a KRS 625 Voluntary Termination and not a KRS 199 Adoption."[9] While we agree that the parties knew that the Kentucky action was a termination action and not an adoption proceeding, we disagree with the trial court's conclusion that the Voluntary and Informed Consent to Adoption documents signed by Moore and Dorning related only to the termination action and not to the proposed adoption action in Ohio.

[9] The trial court further stated that "this Court is confounded by the Respondents' legal position that the execution of the consents by the Petitioners when they were proceeding pursuant to KRS 625 should be legally manipulated into an informed and voluntary consent pursuant to KRS Chapter 199."

Several facts lead us to the inescapable conclusion that the consent forms related to the proposed adoption action and not to the termination action. First, by the clear language of the consents, the documents related directly to the consent to the adoption and made no mention of the termination action. Furthermore, the consents were executed by Moore and Dorning weeks before the termination action was filed, and the Kentucky ICPC administrator who was coordinating the placement of the child in Ohio had no knowledge of the termination action. Also, paragraph 10 of the petition for termination of parental rights revealed that its purpose was to provide the termination of parental rights so that the subsequent adoption in Ohio could proceed without notice to Moore and Dorning.

We further believe the trial court clearly erred in its determination that the consents were not knowingly and voluntarily given.[10] At the time the consents were executed, Moore and Dorning were represented by independent legal counsel. In light of this fact, there was a presumption that their consents were voluntary and informed.[11] See KRS 199.011(14). Furthermore, even if Moore and Dorning were not represented by independent legal counsel, the consents nonetheless contained the

[10] Findings of fact shall not be set aside unless clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01; Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986). If the findings are supported by substantial evidence, they cannot be said to be clearly erroneous. Black Motor Co. v. Greene, Ky., 385 S.W.2d 954, 956 (1964).

[11] We acknowledge that the presumption was rebuttable. See Kentucky Rules of Evidence (KRE) 301.

statutory information to be provided in such cases pursuant to KRS 199.011(14).

The signed consent forms, prepared by the attorney for Moore and Dorning, state in clear language that their consents would become final and irrevocable twenty days after the placement and approval of the placement of the child. The statutory criteria for determining whether the consents were voluntary and informed were met, and Moore and Dorning acknowledged in their consents that they had "been fully informed of the legal effects of this Consent." Further, they each testified that they read and understood the consents prior to signing them.

On the day the consents were signed, Moore and Dorning met with Donnelly and Donna Womack, the family services clinician. Although Donnelly testified he told Moore and Dorning that they had until the termination hearing to revoke their consents, he also acknowledged that he went over the consent forms with Moore and Dorning on the day they signed them and that they indicated they understood the provisions. Furthermore, Womack explained to Moore and Dorning that there were two alternate procedures that could be employed, depending on which one they and their attorney chose. Womack told them that if they used the adoption consent forms, they would have twenty days in which to revoke their consents. She further explained to them that if the termination action was the route to be used, they had until the termination hearing before the court to change their minds. Being thus advised, Moore and Dorning, as well as

Donnelly and Womack, immediately proceeded to a bank to appear before a notary public to sign the consent forms. In short, the consent forms were signed by Moore and Dorning a few minutes after the meeting at which Womack had explained to them the consequences of signing the forms.[12]

Donnelly also testified that Moore called him around March 6, 1998, which was within the twenty-day revocation period, and asked him about calculating the period. He stated that he explained how the period was calculated and further stated that he did not remember again telling Moore that she had until the termination hearing to revoke her consent. When asked why he told Moore the manner of computing the twenty-day period if he believed she and Dorning had until the termination of rights

---

[12]Moore and Dorning have made reference to the investigation report Womack filed with her employer after interviewing them. The report contained a checklist which contained the following:

> B. During your interview with the respective parent, did you:
>
> . . . .
>
> 2. Explain that birth parents can change their minds about agreeing to the adoption until their parental rights have been terminated by Circuit Court action which may happen in a separate action before the applicants petition the court to adopt the child or as part of the court's action on the adoption petition, but the Cabinet cannot represent the birth parents in a legal action? YES

Womack testified, however, that this report form was outdated and that she specifically explained to Moore and Dorning that they would have twenty days in which to revoke their consents if they signed the consent forms. Further, Moore and Dorning may not rely on the language in the report because it was filed by Womack with her employer and was neither given to Moore and Dorning nor made available for their inspection.

hearing to revoke their consents, Donnelly replied only "because she asked me, so I did it."

The numerous facts indicating that Moore and Dorning signed informed consents, together with the trial court's misconception that the consents related only to the termination action, persuade us that the trial court clearly erred when it determined that the consents were invalid. These facts include the clear language of the consent forms themselves, the testimony of Moore and Dorning that they read and understood the consents, the signing of the consents immediately after Womack had informed them of the consequences of signing the consents, and the fact that Moore called Donnelly during the twenty-day period regarding the manner of its calculation.[13]

Further, it is abundantly clear to us that Moore and Dorning were proceeding with a plan for the Asentes to adopt the child and were not merely involved in a termination of parental rights action as stated by the trial court. In addition to signing the adoption consent forms, Moore and Dorning signed the Interstate Compact Placement Request form wherein they acknowledged that the purpose of the placement was for an

[13]Moore and Donnelly contend that even the Asentes believed they had until the termination of rights hearing to revoke their consents. They refer not only to Cheryl Asente's letter to Moore but also to the Legal Risk Statement the Asentes signed. As we noted previously, that document contained a sentence which stated that the Asentes understood the proposed adoption was at risk because "the birth parents can revoke their consents." Because this document was executed on the day the placement of the child was approved and on the day the placement actually took place, we interpret this document as advising the Asentes only that the consent could be subject to revocation by Moore and Dorning within the twenty-day time period set out therein.

independent adoption. Also, the petition to terminate their parental rights even stated that the child had been placed with the Asentes for adoption and that the purpose of the termination action was to allow the adoption to take place in Ohio without notification to Moore and Dorning. We further note that, although Moore and Dorning characterize the procedure employed as a two-part process of termination and then adoption, the fact is the adoption could have been finalized in Ohio, so long as Moore and Dorning had notice, regardless of whether their rights were ever terminated in Kentucky. Obviously, the sole purpose of the unnecessary termination action was to attempt to foreclose any rights that Moore and Dorning might have had as soon as possible.

For the foregoing reasons, the judgments and orders of the Kenton Circuit Court are affirmed in part and reversed in part and remanded for the entry of an order dismissing Moore and Dorning's custody action.

KNOPF, JUDGE, CONCURS.

SCHRODER, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

SCHRODER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. Before I explain my opinion on the case, I believe it is important to provide additional facts which influenced my opinion. Even though on January 27, 1998, Moore and Dorning each executed a "Voluntary and Informed Consent To Adoption", the documents were prepared by their attorney, Thomas Donnelly, for use in the contemplated termination action.[1] Secondly, even

[1]See Exhibit 1 to appellees' brief, letter from their attorney to Asente's attorney dated January 9, 1998, wherein (continued...)

though the consent form in question provides that the consent becomes irrevocable after 20 days, as specified in KRS 199.500(5), the form later says 20 days after approval of placement. The Asentes's attorney states[2] the 20-day period expired March 9, 1998, which was 20 days after approval of placement. See KRS 199.011(14)(h) which allows 30 days to revoke said consent, an obvious conflict in the statutes. To complicate matters further, Donnelly told his clients at the time of signing that they really had until the termination hearing to decide, but that this form was necessary for placement. Donnelly even had the Asentes sign a "Legal Risk Statement" on February 17, 1998, the date placement was approved, stating that although the birth parents executed consents, the birth parents could revoke their consents any time until their rights were terminated. When Regina Moore told Cheryl Asente she wanted Justin back (37 days after placement), Cheryl acknowledged "we understand that he is not ours until you take that final step, no matter how much we want him."[3] Finally, on February 9, 1998, the Family Services Clinician for the Kentucky Department For Social Services interviewed the birth parents and prepared an "Independent Adoption Placement Investigation Report". Paragraph 2 states:

---

[1](...continued)
Donnelly states he will terminate parental rights of his clients and then Asente's attorney can ". . . then carry the ball the rest of the way, filing the adoption petition. . . ."

[2]Page 24 of appellants' brief.

[3]Letter to Regina and Jerry dated March 26, 1998 written by Cheryl Asente.

> Explained that birth parents can change their minds about agreeing to the adoption until their parental rights have been terminated by Circuit Court action which may happen in a separate action before the applicants petition the court to adopt the child or as part of the court's action on the adoption petition, . . .

The worker states on the form that "yes" she explained these rights. At trial she said the form was outdated and she explained consent was irrevocable after 20 days or until termination, in direct contradiction of her written statement. Again, we have another form with incorrect information that is signed this time by the worker to facilitate the placement.

With these additional facts, from the record, I can say that I agree with the majority that Kentucky has jurisdiction to decide whether the "Voluntary and Informed Consent To Adoption" was in fact "informed".[4] Where I disagree with the majority is with its opinion that the trial court was clearly erroneous in finding the informed consent was not informed. I not only believe the trial court did not clearly err, but I believe the court was on the mark.

The entire focus of the adoptive parents' brief, as well as the two amicus briefs, is that the "Voluntary And Informed Consent To Adoption" form creates an irrebuttable presumption that the consent was informed and irrevocable after 20 days with no exceptions. The appellants' attorney even

---

[4]I was very impressed with Judge William M. O'Neill's analysis of the jurisdiction in his opinion from the Ohio Court of Appeals filed November 1, 1999, appendix 8 of appellees' brief. His opinion is sensitive to the emotions of the parties, as well as detailed as to the legal issues.

suggested at oral arguments that since the form was signed, we now consider the best interest of Justin in analyzing whether the consent was informed, and that we know it was an informed consent because Regina Moore had been through the procedure twice before.

The consent form itself, as well as the documents and circumstances, make it clear that the birth parents had until their rights were terminated to revoke consent. First, look at the form itself. The majority says it is clear. I would submit that all four corners of the form must be examined. Paragraph 1 states "that she has been fully informed of the legal effects of this Consent. She understands that twenty (20) days after signing this Consent, it shall become final and irrevocable." (emphasis added). Paragraph 8 states "that this Consent to Adoption will be final and irrevocable twenty (20) days after the execution of the placement . . . and this Consent will be final and irrevocable twenty (20) days after approval of the placement, . . ." (emphasis added). We know placement was on February 17, 1998, but the consent form was signed on January 27, 1998. Which twenty days applies? Appellants' attorney concedes the longer of the two, but that doesn't change the contradictory language of the form, nor paragraph 11 which says "this Consent may only be withdrawn by written notification . . . within twenty (20) days following the execution of the Consent." It is bad enough that the form contains conflicting time tables, but the form fails to comply with KRS 199.011(14)(h) which states a consent form must give the birth parents thirty (30) days following execution of the document. Also, contrary to the majority's opinion, the

consent form does not provide clear language that it is for use in an adoption proceeding only. The form is a Consent to Adopt form and, true, it doesn't mention a termination action, but neither does it mention an adoption action. We know an adoption cannot take place without termination first, so the form granting a consent to adopt impliedly amounts to a voluntary termination. KRS 199.500 says as much when it prohibits an adoption without first terminating parental rights through a termination action or the signing of a consent form. We know from D.S. v. F.A.H., Ky. App., 684 S.W.2d 320 (1985), that an adoption proceeding without prior termination does terminate by operation of law.

More significant than the defective form for "Voluntary and Informed Consent To Adoption" in demonstrating that consent was uninformed, are the surrounding circumstances. Contrary to the majority's opinion, we cannot look at the consent form in a vacuum. The form was drafted by the attorney of the birth parents, Mr. Donnelly, and was executed by the birth parents before Mr. Donnelly. Mr. Donnelly told both the birth parents and the Asentes's attorney that he would do a termination action and the Asentes's attorney could "carry the ball the rest of the way, filing the adoption petition. . . ." Clearly, Donnelly was prepared for a termination action, not an adoption. The Asentes's attorney, John R. Gargano, acknowledged the same on February 19, 1998, in a letter to Mr. Donnelly requesting he have his clients execute a Consent to Adopt form for use in the adoption proceedings, and to send certified copies of the termination order so he could begin the adoption process. If the

earlier consent form was not in contemplation of termination, it sure fooled Asentes's attorney. The birth parents' attorney was misled also because he advised his clients they had until the termination hearing to change their minds. When they questioned the document, which they read and understood to say they only had 20 days, Mr. Donnelly assured them they had until the termination hearing, not 20 days. He explained the language by stating that he had to put that language in the form for placement. Donnelly had to know the inconsistencies because he had both Asentes sign a "Legal Risk Statement" that said they understood "that until the parental rights [of] the birth parents have been terminated their adoption plan is at risk because the birth parents can revoke their consents." If you can't trust your own attorney, whom can you trust, the State? Even the Family Services Clinician for the Kentucky Department For Social Services explained to the birth parents that it was 20 days or until their parental rights were terminated, whichever the attorneys chose. Even at the time Regina Moore called Cheryl Asente with the news that she wanted Justin back, Cheryl Asente wrote "we understand that he is not ours until you take that final step, . . ."

To summarize, the birth parents' attorney informed the birth parents that the form language was incorrect for a termination action, and the state worker agreed that the birth parents had 20 days or until termination to revoke their consent. The adoptive parents signed a Legal Risk Statement saying they also understood the right to revoke consent extended to the termination hearing, and their attorney understood a termination

action would take place before the adoption proceeding, and even requested separate consent forms for the adoption proceeding. Everyone involved, except Justin, was informed that the birth parents had until the termination hearing to revoke their consent. Did the judge clearly err in concluding that the form was filled out for the termination action or that the consent was not informed because Mr. Donnelly misinformed them? I believe the judge was right on both accounts.

You are probably wondering how the majority and I can come to such different conclusions reviewing the same record. I have asked myself that question and can only conclude that the majority was persuaded by the appellants' counsel at oral argument who urged us to forget the issue of consent and look to the best interest of the child. As Judge William O'Neill of the Ohio Court of Appeals noted in the case before him: "Both parties, as well as the American Academy of Adoption Attorneys who filed an amicus brief on behalf of the Asentes, attempt to entice this court into deciding this matter by weighing the respective parenting abilities of the parties. This we decline to do. . . ."[5] I believe this Court should also decline to do so and not be tempted to look at the best interest of the child before the parental rights are terminated. Let me point out that if we start erroneously considering "best interest of the child" in terminating parental rights, any parent could potentially lose their child. Daddy Warbucks would be able to have any child he

[5]Page 15 of the Court's Opinion filed November 1, 1999 in Case Nos. 99-T-0055, 99-T-0056, 99-T-0057, and 99-T-0058.

wanted, without the parents' consent and without first showing the parents are unfit.

This is a highly emotional case, not just for the parties involved, but for this Court and the community as well. I urge the majority to look at the surrounding circumstances, as well as the consent form in reviewing this case. I also believe that the Asentes would do a better job of raising Justin than the birth parents, but that is not the question before us, nor justification for terminating the birth parents' rights. I also am aware that Justin has been with the Asentes since February 17, 1998, which is a long time - plenty of time to bond. However, I am also aware that the Asentes were told 37 days after placement that consent was revoked, and at that time, all agreed the birth parents were entitled to have Justin returned. By keeping Justin, the adoptive parents are trying to bootstrap the "best interest of the child" argument, but it won't change the question before this Court - the legal effect of the consent form signed back on January 27, 1998. The trial court is well aware of the need for a transition period before custody is changed. I support that court's effort to minimize damages to all parties concerned, especially Justin.

For these reasons, I would affirm the trial court.

BRIEFS FOR APPELLANTS:

Mitchell A. Charney
Stephanie L. Morgan-White
Louisville, KY

ORAL ARGUMENTS FOR APPELLANTS:

Mitchell A. Charney
Louisville, KY

BRIEF FOR APPELLEES:

Glenda Harrison
Northern Ky. Legal Aid
Covington, Kentucky

Stephanie Dietz
Elsmere, Kentucky

ORAL ARGUMENTS
FOR APPELLEES:

Glenda Harrison
Northern Ky. Legal Aid
Covington, KY

AMICUS CURIAE BRIEF OF
AMERICAN ACADEMY OF
ADOPTION ATTORNEYS:

W. Waverly Townes
Louisville, KY

AMICUS CURIAE BRIEF OF THE
KENTUCKY CABINET FOR FAMILIES
& CHILDREN:

Hiren B. Desai
Frankfort, KY